LIM SIONG

v.

TIMBALAN MENTERI KESELAMATAN DALAM NEGERI, MALAYSIA & ORS

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPLICATION NO: 44-55-2007]
6 NOVEMBER 2007

PREVENTIVE DETENTION*: Detention order - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Application for habeas corpus - Whether upon statutory construction of s. 4(1) Ordinance the Minister must issue an order of detention expeditiously - Whether there was a breach of s. 4(1) Ordinance - Time frame as prescribed by s. 3(3) Ordinance - Whether s. 6(2) Ordinance complied with - Whether non-compliance rendered detention order invalid*

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Detention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 - Whether upon statutory construction of s. 4(1) Ordinance the Minister must issue an order of detention expeditiously - Whether there was a breach of s. 4(1) Ordinance - Time frame as prescribed by s. 3(3) Ordinance - Whether s. 6(2) Ordinance complied with - Whether non-compliance rendered detention order invalid*

This was an application by one Lim Siong ('the detenue') who sought an order of *habeas corpus* in respect of an order made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') dated 21 March 2007, issued by the Minister of Home Affairs ('Minister'). By virtue of the order of 21 March 2007, ('the detention order') the detenue was to be detained at the Simpang Renggam Rehabilitation Centre for a period of one year commencing from 21 March 2007. The issues that arose for determination: (a) whether upon a statutory construction of s. 4(1) of the Ordinance, there was a mandatory/ constituent procedural requirement in that section that the Minister must issue an order for detention expeditiously, upon being satisfied that it was necessary to do so; (b) whether, as a result of the above, the Minister had to specify the date when he was 'satisfied' that a detention order was necessary; and explain

the time lapse, if any between the date of his satisfaction and the date of issuance of the detention order and consequently whether a failure or omission to do so either amounted to a breach of s. 4(1) of the Ordinance; (c) whether the date of satisfaction of the minister was equivalent to the date of the issuance of the detention order, or *vice versa*, namely that the commencement date of the order was equivalent to the minister's satisfaction; (d) whether s. 4(1) imposes a duty on the Minister to act at all convenient speed or expeditiously so as to ensure that the date when he received the investigation file of the detenue and the date of issuance of the order were as close as possible or coincided and if they did not coincide whether there was a duty to explain such delay and whether a failure to explain such delay amounted to a breach of s. 4(1) of the Ordinance; (d) whether the Yang di Pertuan Agong had responded to the recommendations of the Board and had accorded his assent to the same, when as a matter of fact he had not, was material or amounted to a breach of s. 6(2) of the Ordinance.

Held (granting the relief of *habeas corpus*):

(1) The subject words 'If the Minister is satisfied' do not stipulate a literal chronology of acts which the Minister is bound to undertake or perform when issuing a detention order. The date of the issuance of the order was the date of the Minister's satisfaction and accordingly there was no requirement for the Minister to specify such a date in his affidavit. The requirement that the Minister act with all convenient speed does not arise in the instant case because the act of issuing the detention order and his satisfaction that it should be issued are one. (paras 17 & 21)

(2) The words in s. 4(1) of the Ordinance do not create a procedural requirement that the date of the minister's satisfaction has to be specified and that an omission to do so amounts to a procedural non-compliance. Neither do those words give rise to a procedural requirement that a time lapse, if any, between the minister's satisfaction and the issuance of the order must be explained. Accordingly to read any such procedural requirement into s. 4(1) of the Ordinance would be to create a procedural requirement which was not the function of this court. (para 26)

(3) There was no requirement for the Minister to specify the date when he was 'satisfied' that a detention order was necessary as it coincided with the date of issuance of the order. This was not a presumption but followed from a construction of s. 4(1) of the Ordinance whereby the word 'if' denotes a condition precedent to the exercise of discretion by the minister rather than providing for a two step procedure whereby the Minister is first satisfied and then as a second step issues a detention order. He simply issues or does not issue a detention order depending on whether or not he is satisfied that the pre-requisites set out in the section are met. Therefore, the issue of delay or having to explain a delay does not arise. Consequently, there was no breach of s. 4(1) of the Ordinance. (para 27)

(4) The time frame for both investigation and the decision of the Minister as prescribed by s. 3(3) of the Ordinance which provides for a sixty day period within which any such order of detention must be made. There appeared to be no basis to impose into the section a requirement to further curtail or limit that time frame. It was in the ultimate interests of the detenue that the Minister give full consideration to the entire matter before deciding whether or not to issue a detention order. (para 29)

(5) Sections 6(1) and (2) provide the detenue with substantive rights to appeal against the order of detention to the advisory board and the Yang Di Pertuan Agong, and cast a specific burden on the Yang Di Pertuan Agong to accord a comprehensive and thorough consideration of the appeal. The fact that the Yang Di Pertuan Agong had not as of 23 April 2007 given such consideration to the detenue's appeal was a relevant and salient fact as it went to the issue of compliance with s. 6(2) of the Ordinance. It followed then that the erroneous affirmation of this fact by the Minister was grave as it represented that the rights of the detenue have been completely met and rejected when this was not the true position. Such an affirmation could not be lightly cast aside by the application of the *maxim de minimis non curat lex*. There had therefore been a failure to comply with the requirements of s. 6(2). As this was a procedural requirement under the Ordinance, such non-compliance rendered the order of detention invalid. (para 41)

Case(s) referred to:

Hong Siew Sin & Anor v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1990] 1 CLJ 886; [1990] 1 CLJ (Rep) 121 SC ***(refd)***

Kumaran Suppiah v. Dato' Noh Hj Omar & Anor [2006] 4 CLJ 675 FC ***(refd)***

Liew Kim Swee lwn. Menteri Dalam Negeri, Malaysia & Satu Lagi [1991] 1 CLJ 53; [1991] 1 CLJ (Rep) 672 HC ***(refd)***

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(3), 4(1), 6(1), (2), 7C

Interpretation Act 1967, s. 54(2)

For the applicant - Suresh (Alvinthiren with him); M/s Alvinthiren & Partners
For the respondents - Tengku Amir Zaki FC

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

Introduction

[1] This is an application by one Lim Siong ('the detenue') who seeks an order of *habeas corpus* in respect of an order made under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the Ordinance') dated 21 March 2007, issued by the Minister of Home Affairs ('Minister'). By virtue of the order of 21 March 2007 ('the Detention Order') the detenue is to be detained at the Simpang Renggam Rehabilitation Centre for a period of one year commencing from 21 March 2007.

Relevant Facts

[2] The detenue was originally detained *vide* an order dated 10 May 2006 which took effect on 13 May 2006, at the Simpang Renggam Rehabilitation Centre. On 23 February 2007 the High Court at Shah Alam granted Lim Siong's application for *habeas corpus*, and he was produced in court. However, Lim Siong was not freed. He was re-arrested and returned to the custody of a police officer and eventually detained in Simpang Renggam under a second detention order, which is the subject matter of challenge under the present application.

[3] The salient facts relating to the Detention Order are that the Deputy Minister (The Deputy Minister is authorized to carry out these functions of the Minister of Home Affairs under art. 43A(2) and s. 40 of the 11th Schedule of the Federal Constitution) was given the investigation file for Lim Siong on 6 March 2007. He examined and duly considered the facts and thereafter decided that the applicant should be detained under s. 4(1) of the Ordinance with effect from 21 March 2007 for a period of one year. The said Detention Order was issued on 21 March 2007.

Submissions For The Applicant

[4] Counsel for the applicant put forward in summary, the following grounds for alleging that the order dated 21 March 2007 issued by the Deputy Minister of Home Affairs for the detention of Lim Siong was defective:

(a) There was non-compliance with s. 4(1) of the Ordinance. The salient words of the section provide that "if the Minister is satisfied ... he shall issue a detention order". It was contended that the date of "satisfaction" of the Minister was not the date of the issuance of the detention order.

(b) The date of "satisfaction" was separate and distinct from the date of issuance of the detention order. Following from the decision in *Kumaran Suppiah v. Dato' Hj Mohd. Noh* [2006] 4 CLJ 675 ('*Kumaran Suppiah*'s case'), the Minister was bound to specify or disclose the date on which he was "satisfied" that a detention order was necessary. In the instant case the Deputy Minister had omitted to specify such date. It was therefore not possible to ascertain that he had indeed issued the detention order on the date of his satisfaction. If there was a *lacuna* or time lag between the date of his "satisfaction" and the delay in the issuance of the detention order, then following again from the decision of the Federal Court in *Kumaran Suppiah*'s case it was not possible to ascertain whether the Minister had acted "at all convenient speed" or expeditiously as required of him under s. 4(1) of the Ordinance. Accordingly the date of the "satisfaction" of the Minister should have been specified, and any delay between the date of "satisfaction" and the date of the issuance of the detention order ought to have been explained. A failure to do so, as in the instant case has resulted in a breach of a mandatory procedural requirement of s. 4(1) of the Ordinance;

(c) Alternatively there was non-compliance with s. 4(1) of the Ordinance in that the investigation file in respect of the detenue, had been handed over to the Deputy Minister on 6 March 2007 and he had issued the detention order on 21 March 2007. If the date of the detention order is taken to be the date when the Minister was "satisfied", ie on 21 March 2007, then there is an unexplained delay of sixteen days between 6 March 2007 and 21 March 2007. Following from the decision of the Federal Court in *Kumaran Suppiah*'s case, such a delay had to be explained and a failure to do so amounted to a breach of s. 4(1) of the Ordinance.

(d) There was a contradiction between the affidavits of the Deputy Minister and the Secretary of the Advisory Board who had both affirmed affidavits on the same day. The contradiction related to the issue of whether or not the Yang Di Pertuan Agung had responded to the recommendations made by the Advisory Board. The net effect of such contradictions amounted to a procedural impropriety justifying the detention order being declared invalid.

Submissions Of The Respondent

[5] The respondent responded thus:

(a) There is no procedural requirement that the Minister specify the date when he is "satisfied" under the provisions of s. 4(1) of the Ordinance. The only time frame which comes into play when the Minister is considering whether or not to exercise his discretion under s. 4(1) of the Ordinance is the balance of the sixty day period after investigations are complete under s. 3(3) of the Ordinance. The Minister cannot issue an order of detention after the lapse of the sixty days specified in that section. The date of issuance of the detention order is the date of the satisfaction of the Minister. Accordingly there is no question of delay on the part of the Minister. *Kumaran Suppiah*'s case was distinguished on the grounds that it dealt with the delay between the date of issuance of the order and the date of commencement of the detention, unlike the fact situation in the instant case.

(b) It does not follow from the decision of the Federal Court in *Kumaran Suppiah*'s case, that the time lapse between the date when the Minister received the file, ie 6 March 2007 and the date of the issuance of the order, 21 March 2007 (which is also the date of the Minister's satisfaction) is a delay which has to be explained. The Minister may consider and arrive at a decision at any time within the balance of the sixty day period stipulated in s. 3(3) of the Ordinance. Accordingly there is no delay at all in the issuance of the detention order.

(c) Finally in respect of this contention, the respondent argued that if the court was of the view that there was a mandatory requirement that the Minister act expeditiously to issue an order upon being satisfied that a detention order was necessary, then any such requirement was merely directory and not mandatory.

(d) As for the issue of the apparent "contradictions" in the affidavits affirmed by the Deputy Minister and the Secretary of the Advisory Board, the respondent argued that it was not a material contradiction or discrepancy. It was contended that the Minister had made a genuine mistake in his affidavit. The court was urged to apply the maxim of *"de minimis non curat lex"* (the court should not deal in trivialities) relying on the decision in *Hong Siew Sin & Anor. v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor.* [1990] 1 CLJ 886; [1990] 1 CLJ (Rep) 121. Further, directions if any which were issued by the Yang Di Pertuan Agung, could not be the subject-matter of judicial review by this court, and therefore it was not material that any such directions be considered by this court. What was required under s. 6(2) of the Ordinance was that the representations of the advisory board be forwarded to the Yang Di Pertuan Agung within three months from the date of receipt of the detenue's representation, and this had been done. Accordingly there was no breach of a mandatory procedural requirement. The respondent cited the case of *Liew Kim Swee lwn. Menteri Dalam Negeri, Malaysia & Satu Lagi.* [1991] 1 CLJ 53; [1991] 1 CLJ (Rep) 672 as authority for this proposition.

Issues For Determination

[6] The issues that arise for determination are therefore as follows:

A (i) Whether, following from the decision of the Federal Court in *Kumaran Suppiah*'s case, and upon a statutory construction of s. 4(1) of the Ordinance, there is a mandatory/constituent procedural requirement in that section that the Minister must issue an order for detention expeditiously, upon being satisfied
B that it is necessary to do so;

(ii) Whether, as a result of the above, the Minister has to specify the date when he was "satisfied" that a detention order was necessary; and explain the time lapse, if any between the date
C of his "satisfaction" and the date of issuance of the detention order. And consequently whether a failure or omission to do either amounts to a breach of s. 4(1) of the Ordinance; or

(iii) Whether the date of satisfaction of the Minister is equivalent to the date of the issuance of the detention order, or *vice-*
D *versa*, namely that the commencement date of the order is equivalent to the Minister's satisfaction;

(iv) Whether s. 4(1) imposes a duty on the Minister to act at all convenient speed or expeditiously so as to ensure that the
E date when he receives the investigation file of the detenue and the date of issuance of the order (which matches the date of satisfaction of the Minister) are as close as possible or coincide. If they do not coincide whether there is a duty to explain such delay and whether a failure to explain such delay
F amounts to breach of s. 4(1) of the Ordinance. Following from the reasoning and decision in *Kumaran Suppiah*'s case.

(v) Whether the contradiction between the affidavits of the Deputy Minister and the Secretary of the Advisory Board as
G to whether the Yang di Pertuan Agung had responded to the recommendations of the board and accorded his assent to the same, when as a matter of fact, he had not, is material or amounts to a breach of s. 6(2) of the Ordinance.

H **Analysis Of Issues (i), (ii) And (iii)**

[7] The three issues outlined above in (i), (ii) and (iii) may be considered together as they are inter-related.

I

Section 4(1) of the Ordinance provides as follows: A

> **If the Minister is satisfied that** with a view to preventing any person from acting in any manner prejudicial to public **order it is necessary that that person should be detained,** or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, **the Minister shall make an order** (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years. (emphasis added) B

[8] The section expressly provides that "If the Minister is satisfied" that it is necessary for the reasons or in the circumstances prescribed by s. 4(1) that a person be detained, he shall make the order for detention. The Minister's satisfaction is therefore a pre-condition to the making of a detention order. If the Minister is not "satisfied" that the reasons set out in s. 4(1) have been made out, no detention order will ensue. C D

[9] The further issue that then arises for consideration is this:

[10] How are the words "If the Minister is satisfied' to be construed in s. 4(1) of the Ordinance? E

(a) Do the words prescribe two procedural steps or tiers in the decision making process, one consequent upon the other? First that the Minister event it is contended for the detenue that the Minister is bound to act "at all convenient speed" or expeditiously, is "satisfied" that it is necessary to make the order and second the actual issuance of the detention order by signing and issuing the order. In such between the time he is satisfied and the date of issuance of the detention order, in keeping with the provisions of s. 54(2) of the Interpretation Act 1967 as set out by the Federal Court in *Kumaran Suppiah*'s case; alternatively F G

(b) Do the words comprise a condition precedent to the exercise of the discretion vested in the Minister, to carry out one sole act, namely to issue a detention order? In other words, do the words serve to prescribe the matters and issues that the Minister has to satisfy himself of, prior to the issuance of an order? In such event, the issue of the Minister acting expeditiously and at all convenient speed does not arise H I

because the words comprise a part of one act on the part of the Minister. In other words, the "satisfaction" of the Minister is inseparable from the date of issuance of the order. The words do not ascribe a literal chronology of acts which the Minister is bound to carry out/undertake when issuing a detention order. The date of the issuance of the order is the date of the Minister's satisfaction and accordingly there is no requirement for the Minister to specify such a date in his affidavit.

With Respect To (a): Whether The Section Prescribes Two Procedural Steps Or Tiers In The Decision Making Process, One Consequent Upon The Other

[11] In *Kumaran Suppiah*'s case the issue that fell for consideration was whether the date of issuance of the order under s. 4(1) of the Ordinance could differ from the date of actual commencement of the detention order. In concluding that the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of the making of the detention order, Augustine Paul FCJ in delivering the decision of the Federal Court stated as follows:

> ... The fact that s. 4(1) of the Ordinance is silent with regard to the time within which the detention order must be made to take effect does not mean that the Minister has a complete discretion in determining the date. Where no time has been prescribed for the doing of an act in a statutory provision it must be read with s. 54(2) of the Interpretation Act 1967 ("s. 54(2)") which reads as follows:
>
> > Where no time is prescribed within which anything shall be done, the thing shall be done with all convenient speed and as often as the prescribed occasion arises.
>
> In cases such as *Tai Choi Yu v. Government of Malaysia* [1994] 2 CLJ 174 and *Ex parte Austco Pty Ltd* [1985] 2 QD R 1 it was observed that what will be all convenient speed will depend upon the facts and peculiar circumstances of each case. As s. 4(1) of the Ordinance read with s. 54(2) deals with preventive detention it must be strictly construed. Thus the requirement as to the time within which a detention order must be made to take effect must be the same or as close as possible to the date of making of the detention order. Where both the dates do not

coincide the delay must be explained. This is in line with the rule that any delay in a matter that must be done within a reasonable time must be satisfactorily explained (see *Bidya Deb Barma v. District Magistrate, Tripura* AIR [1969] SC 323; *SK Salim v. The State of West Bengal* AIR [1975] SC 602; *R v. Inspector of Taxes, Ex parte Clarke* [1971] 3 WLR 425). The necessity for such an explanation must therefore be read as a constituent part of s. 4(1) of the Ordinance …

[12] Although the aforesaid was said in the context of the time lapse between the date of issuance of the detention order and the date of commencement of the detention order, the detenue argues that a similar requirement should also follow in respect of the time lapse, if any, between the date of the Minister's satisfaction and the date of issuance of the order. As stated earlier, this particular construction of s. 4(1) provides that the Minister, from a procedural viewpoint, has to perform or undertake two separate tasks, namely:

(1) Be satisfied that a detention order is necessary, and

(2) Issue the detention order

[13] There is no time specified in s. 4(1) as to when or how soon the Minister should issue the detention order upon being satisfied that such an order is necessary. The issue is whether a requirement as to the time within which a detention order must be made after the Minister is "satisfied" that it is necessary, can be construed into s. 4(1) of the Ordinance, as was done in *Kumaran Suppiah*'s case. Such a construction would require importing the provisions of s. 54(2) of the Interpretation Act 1967 into the first part of s. 4(1) of the Ordinance, such that it becomes a mandatory procedural requirement that the issuance of the detention order follows upon the Minister's satisfaction at all convenient speed or as expeditiously as possible. As the section does not prescribe how soon the detention order has to be issued after the Minister is satisfied, the provisions of the Interpretation Act 1967 require that that time gap be minimal or as close as possible, in keeping with the reasoning in *Kumaran Suppiah*'s case.

[14] It was further contended that such an interpretation is tenable as it does not in any manner infringe or encroach on the entitlement of the Minister to take as long as he reasonably requires to come to a decision after the investigation is complete,

within the time frame of sixty days as prescribed in s. 3(3) of the Ordinance. The time frame for investigation until the issuance of an order of detention can take up to sixty days. In other words, after an investigation is complete, a Minister can utilize as much time as is available within the balance of the time frame of sixty days prescribed under s. 3(3) of the Ordinance to arrive at a decision, or to be "satisfied". However, being so "satisfied" he must act at all convenient speed to issue the detention order. And if there is a time gap between these latter two events, the Minister is bound to issue an explanation for the delay. Such a construction requires that the Minister disclose the date on which he was satisfied that a detention order was necessary in order that it can be determined that an order was in fact issued expeditiously thereafter.

Alternatively,

With respect to (b): Do the words comprise a condition precedent to the exercise of the discretion vested in the Minister, to carry out one sole act, namely to issue a detention order? In other words, do the words prescribe the matters and issues that the Minister has to be satisfied of, prior to the issuance of an order, and no more?

[15] The plain and unambiguous meaning to be attributed to the words "If the Minister is satisfied ... it is necessary that that person should be detained ... the Minister shall make an order ..." are simply that the Minister is bound to make an order of detention only if he is satisfied that the matters set out in s. 4(1) of the Ordinance have been fulfilled. Otherwise the Minister cannot make such an order, and any attempt to do so would be invalid. In short the words "If the Minister is satisfied" serve to provide a condition precedent to the exercise of discretion by the Minister.

[16] It follows that if the words comprise a condition precedent to the Minister making a detention order, then contrary to the construction adopted above in (a), there is only one act that is carried out by the Minister, namely the issuance of a detention order, but only if he is satisfied that the circumstances of s. 4(1) of the Ordinance have been fulfilled. There are therefore no two steps or two tiers prescribed by s. 4(1), but merely one act. If the Minister is not bound under s. 4(1) of the Ordinance to

undertake or perform two separate tasks, then it would follow *sine qua non* that the issue of the Minister having to act expeditiously and at all convenient speed does not arise, because there is only one act that the Minister is bound to do under that section, namely issue a detention order but only if he is satisfied that the requisite conditions prescribed are fulfilled. In other words, the "satisfaction" of the Minister is inseparable from the date of issuance of the order.

[17] The subject words "If the Minister is satisfied" do not therefore stipulate a literal chronology of acts which the Minister is bound to undertake or perform when issuing a detention order. The date of the issuance of the order is the date of the Minister's satisfaction and accordingly there is no requirement for the Minister to specify such a date in his affidavit.

Is (a) Or (b) To Be Adopted In Construing s. 4(1) Of The Ordinance?

[18] To my mind the construction set out in (b) is preferable. This is because the subject words, "If the Minister is satisfied" prescribe a condition precedent rather than specifying two stages in the decision making process of the Minister in exercising the discretion vested in him. The Minister's satisfaction concurs or coincides with the issuance of the detention order. It prefaces the making of the detention order by stipulating a condition precedent for its issuance. It therefore follows that there is no time gap between the Minister's satisfaction and the issuance of the order. There is only one act. As there are no two "separate" acts undertaken by the Minister in exercising his discretion under s. 4(1) of the Ordinance, it is not possible to import the provisions of the Interpretation Act to read a requirement of expediency into the one act undertaken by the Minister.

[19] Such a reading is further fortified by the consideration that s. 4(1) uses the word "if rather than "when". The word "if serves to preface the stipulation or condition or proviso that the Minister has to satisfy himself of, in order to issue the order. If the word "when" had been utilized instead, then it might well be contended that at the point in time or after the Minister is "satisfied" that the circumstances described in s. 4(1) have been met, then only would he issue the detention order. This incorporates the element of time and may well have lent itself to the requirement that the Minister act expeditiously. However that is not the case here.

[20] It should not however be concluded that simply because such a procedural requirement for "all convenient speed" has not been read into the first part of s. 4(1) of the Ordinance, that expedience is forgotten altogether. Indeed it has not. The Minister is constrained by the time frame of sixty days allowed *in toto* for investigation and his decision. The Minister is accorded time to arrive at his decision as it involves preventive detention and as such, the exercise of his discretion cannot be made mechanically or robotically without a full consideration of the factors put before him.

[21] A further reason for adopting the construction in (b) is that it reflects the plain and unambiguous meaning that may be gleaned from that section. The construction put forward in (a) would require that a mandatory procedural requirement as to time be read into s. 4(1) of the Ordinance by importing a portion of the reasoning from *Kumaran Suppiah v. Dato' Noh Hj Omar & Anor*, and extending that decision well beyond its specified scope. The requirement that the Minister act with all convenient speed does not arise in the instant case because the act of issuing the detention order and his satisfaction that it should be issued are one. As stated earlier, that case dealt with a difference in time between the dates of the issuance of the detention order and the date of commencement of the order, which was evident on the face of the detention order. Here, the issue of two separate acts conducted on different dates, disclosing *ex facie*, a time lapse, does not arise.

[22] Such a construction has also been adopted in *Sasai Kumar a/l Selatory v. Dato' Mohd. Johari bin Baharum* [2007] High Court Johore Bahru, where Syed Helmy J stated:

> ... it is pertinent to note that under the provisions of s. 4(1) of the Ordinance *the Minister's satisfaction must be taken to be the effective date of the commencement of the detention or putting it another way – the detention is operative from the date of the Minister's satisfaction* ... (emphasis added).

[23] The terms of the detention order also reflect the concurrence of the Minister's "satisfaction" and the issuance of the order. It provides as follows:

> Bahawasanya saya, berpuashati yang Perintah Tahanan adalah perlu di buat ke atas orang yang namanya tersebut di bawah ini dengan tujuan: ...
>
> ... MAKA, OLEH YANG DEMIKIAN, pada menjalankan kuasa yang di beri dibawah Seksyen 4(1) Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969, saya dengan ini memerintahkan supaya orang yang namanya yang tersebut di atas di tahan selama ...

[24] On the face of the order of detention it is appears that the satisfaction of the Minister coincides with the issuance of the order. The order stipulates that the Minister is satisfied on the grounds stated therein that an order has to be issued and therefore issues the same.

[25] Finally this court is mindful that it is constrained by virtue of s. 7C of the Ordinance to consider only non-compliance with any procedural requirement in the Ordinance governing such act or decision. As stated by Abdul Hamid Mohamad FCJ:

> ... In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a *habeas corpus* application where the detention order of the Minister made under s. 4(1) of the Ordinance or, for that matter, the equivalent ss. in ISA 1960 and DD (SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance ...

[26] The words in s. 4(1) of the Ordinance do not, to my mind, create a procedural requirement that the date of the Minister's satisfaction has to be specified and that an omission to do so amounts to a procedural non-compliance. Neither do those words give rise to a procedural requirement that a time lapse, if any, between the Minister's satisfaction and the issuance of the order must be explained. This is for the reasons set out above.

Accordingly to read any such procedural requirement into s. 4(1) of the Ordinance would be to create a procedural requirement which is not the function of this court.

Issues (ii) and (iii): Whether, as a result of the above, the Minister has to specify the date when he was "satisfied" that a detention order was necessary; and explain the time lapse, if any between the date of his "satisfaction" and the date of issuance of the detention order. And consequently whether a failure or omission to do either amounts to a breach of s. 4(1) of the Ordinance

[27] By reason of the construction adopted above, it follows that there is no requirement for the Minister to specify the date when he was "satisfied" that a detention order was necessary as it coincides with the date of issuance of the order. This is not a presumption but follows from a construction of s. 4(1) of the Ordinance whereby the word 'if' denotes a condition precedent to the exercise of discretion by the Minister rather than providing for a two step procedure whereby the Minister is first satisfied, and then as a second step issues a detention order. He simply issues or does not issue a detention order depending on whether or not he is satisfied that the pre-requisites set out in the section are met. Therefore the issue of a delay or having to explain a delay does not arise. Consequently, there is no breach of s. 4(1) of the Ordinance. This ground fails.

Issue (iv): Whether s. 4(1) as imposes a duty on the Minister to ensure that the date when he receives the investigation file of the detenue and the date of issuance of the order are as close as possible or coincide; and if the dates do not coincide whether there is a duty to explain such delay

[28] This contention envisages importing or reading into s. 4(1) of the Ordinance a requirement for the Minister to act with "all convenient speed" and with virtually no time gap between the date when he receives the investigation file and the date when he issues the detention order. However such a construction would have the effect of further curtailing or limiting the time available to the Minister to understand and address his mind as to whether or not a detention order is necessary for any particular person. Such a construction would allow for the criticism that the Minister had not fully appraised himself and addressed his mind as to the necessity to issue the detention order.

[29] Neither do the words of that section lend themselves to further importing the provisions of the Interpretation Act in determining the time interval between the handing over of the investigation papers/file and the Minister's satisfaction and issuance of the detention order. The time frame for both investigation and the decision of the Minister as prescribed by s. 3(3) of the Ordinance which provides for a sixty day period within which any such order of detention must be made. There appears to be no basis to impose into the section a requirement to further curtail or limit that time frame. It is in the ultimate interests of the detenue that the Minister give full consideration to the entire matter before deciding whether or not to issue a detention order. This ground therefore also fails.

Issue (iv): Whether the contradiction between the affidavits of the Deputy Minister and the Secretary of the Advisory Board as to whether the Yang di Pertuan Agung had responded to the recommendations of the Board and accorded his assent to the same, when as a matter of fact, he had not, is material or amounts to a breach of s. 6(2) of the Ordinance.

[30] The Minister *vide* his affidavit of 23 May 2007 categorically stated in paras 11 and 15 that:

(a) He honestly believed that the entire process of detention including the assent of the Yang Di Pertuan Agung had been fulfilled in accordance with the provisions of the Federal Constitution and the Ordinance; and

(b) The detention order that had been issued against the detenue had been assented to by the Yang Di Pertuan Agung after His Majesty considered the recommendations of the advisory board.

[31] The Secretary of the advisory board on the other hand, by an affidavit affirmed on the same date averred as follows:

(a) On 23 April 2007 after considering the representations made by the applicant the advisory board made recommendations about the said representations to the Yang Di Pertuan Agung. However, to date, the recommendations have not been received from the Yang Di Pertuan Agung by the advisory board.

[32] It is evident from the affidavit of the Secretary of the advisory board that the Yang Di Pertuan Agung had not as of 23 April 2007 reverted to the advisory board with his directions, if any, on the recommendations forwarded by the advisory board.

[33] There is therefore a contradiction between the two affidavits. In a subsequent affidavit the Secretary clarified that the contents of her affidavit were true. She went on to state that the Minister had made a genuine mistake in affirming to the fact that the Yang Di Pertuan Agung had assented to the detention of the detenue.

[34] It falls to be considered whether the contradictions are material and in any way give rise to the transgression of a mandatory procedural requirement that renders the detention order invalid.

Has non-compliance with a procedural requirement under the Ordinance been occasioned by reason of the contradictions in the affidavit, or the mistake in the Minister's affidavit of 23 April 2007?

[35] Section 6(1) of the Ordinance provides that the advisory board is bound to consider representations made to it and forward those representations together with its recommendations to the Yang Di Pertuan Agung within a period of three months of receipt of those representations, or such further time as may be permitted by the Yang Di Pertuan Agung.

[36] The advisory board did in the instant case consider and forward the representations made to it together with its recommendations as required under s. 6(1) within the three month period imposed on it. To that extent there has been full compliance with the requirements of that section.

s. 6(2) provides as follows: "Upon considering the recommendations of the advisory board under this section the Yang Di Pertuan Agung may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang Di Pertuan Agung thereon shall, subject to the provisions of s. 7, be final, and shall not be called into question in any court."

[37] Sections 6(1) and (2) therefore impose a duty on the Yang Di Pertuan Agung to consider the representations made by the detenue in conjunction with the recommendations of the advisory board. By virtue of s. 6(2), after considering the recommendations of the advisory board, the Yang Di Pertuan Agung may give the Minister a direction or he may choose not to. What is apparent however, is that it is a procedural requirement that the representations of the detenue and the recommendations of the advisory board have to be considered by the Yang Di Pertuan Agung. The Minister in this case has averred to the fact that the Yang Di Pertuan Agung has discharged the burden cast on him by this section, and assented to the order of detention.

[38] However it is apparent from the affidavit of the Secretary of the advisory board that he has not responded either with his assent or with directions.

[39] It would therefore follow that neither the Minister nor the Secretary of the advisory board has any knowledge as to whether the Yang Di Pertuan Agung has considered the representations or the recommendations. As such s. 6(2) has not been complied with. However the respondents maintain that the fact that the Yang Di Pertuan Agung has not responded cannot amount to a procedural failure for which they are responsible. That they maintain falls entirely within the purview of the Yang Di Pertuan Agung. The advisory board has complied wholly with its obligations under s. 6(1) by forwarding the representations and its recommendations to the Yang Di Pertuan Agung.

[40] The Minister has however affirmed an affidavit which shows that he either did not address his mind fully as to whether or not the provisions of s. 6(2) of the Ordinance had been complied with. He has made a statement on oath which suggests not only full compliance with ss. 6(1) and (2), but also referred to the assent of the Yang Di Pertuan Agung thereby representing that the Yang Di Pertuan Agung had in fact accepted the recommendations of the advisory board as of 23 April 2007 when this was not the case. The Minister's affirmation of the affidavit without ascertaining that the contents were in fact actually true, appears to be hasty and somewhat casual.

[41] Sections 6(1) and (2) provide the detenue with substantive rights to appeal against the order of detention to the advisory board and the Yang Di Pertuan Agung, and cast a specific burden on the Yang Di Pertuan Agung to accord a comprehensive and thorough consideration of the appeal. The fact that the Yang Di Pertuan Agung had not as of 23 April 2007 given such consideration to the detenue's appeal is a relevant and salient fact as it goes to the issue of compliance with s. 6(2) of the Ordinance. It follows then that the erroneous affirmation of this fact by the Minister is grave as it represents that the rights of the detenue have been completely met and rejected when this is not the true position. Such an affirmation cannot be lightly cast aside by the application of the maxim *de minimis non curat lex*. There has therefore been a failure to comply with the requirements of s. 6(2). As this is a procedural requirement under the Ordinance, such non-compliance renders the order of detention invalid. The relief of *habeas corpus* is therefore granted.